

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6657
DATE COMPLAINT FILED: 10/4/12
DATE OF NOTIFICATION: 10/10/12
DATE OF LAST RESPONSE: 11/29/12
DATE ACTIVATED: 3/1/13

ELECTION CYCLE: 2012
EXPIRATION OF SOL: 9/14/2017

COMPLAINANT:

Missouri Democratic State Committee

RESPONDENT:

Akin for Senate and G. Scott Engelbrecht in his
official capacity as treasurer

W. Todd Akin

Senate Conservatives Fund and Lisa Lisker in her
official capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 441a(a)
2 U.S.C. § 441b
2 U.S.C. § 441i(e)
11 C.F.R. § 109.20
11 C.F.R. § 109.21
11 C.F.R. § 100.26
11 C.F.R. § 100.29
11 C.F.R. § 300.61

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint in this matter, which was filed one month before the 2012 general
election, alleges that the Senate Conservatives Fund was "[a]bout to [m]ake," and W. Todd Akin

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1 and Akin for Senate were “[a]bout to [r]eceive [i]llegal [i]n-[k]ind [c]ontributions” in violation
2 of 2 U.S.C. §§ 441a(a) and 441b, as a result of alleged coordinated communications. Compl. at
3 3. The Complaint further alleges that Akin may have violated 2 U.S.C. § 441i(e) by soliciting
4 funds in excess of the contribution limits of the Federal Election Campaign Act of 1971, as
5 amended (the “Act”). Compl. at 4.

6 As discussed below, the alleged prospective coordinated communications on which the
7 Complaint is based never occurred. Accordingly, we recommend that the Commission find no
8 reason to believe that the Respondents violated 2 U.S.C. §§ 441a, 441b, or 441i(e), and close the
9 file.

10 II. FACTUAL AND LEGAL ANALYSIS

11 A. Facts

12 The Senate Conservatives Fund registered with the Commission as the leadership PAC of
13 then-Senator Jim DeMint on April 15, 2008. Statement of Organization (Apr. 15, 2008),
14 <http://images.nictusa.com/pdf/797/28039690797/28039690797.pdf>. The group most recently
15 amended its Statement of Organization in July 2012 to remove DeMint as sponsor and MINT
16 PAC as an affiliate. Amended Statement of Organization (July 1, 2012),
17 <http://images.nictusa.com/pdf/394/12952245394/12952245394.pdf>. The Senate Conservatives
18 Fund now files as a multicandidate committee. March 2013 Monthly Report (Apr. 19, 2013),
19 <http://images.nictusa.com/pdf/205/13961856205/13961856205.pdf>.¹

¹ The Complaint mistakenly alleges that the Senate Conservatives Fund “remove[d] its affiliation with Senator DeMint so that it could operate as a so-called ‘super PAC.’” Compl. at 2. According to the Senate Conservatives Fund, it is a “traditional” non-connected political committee, and therefore the contributions it receives, and independent expenditures it makes, are all subject to the limits and other prohibitions of the Act. Senate Conservatives Fund Resp. at 2. The Commission’s records appear to confirm the Senate Conservatives Fund’s statement. See March 2013 Monthly Report (Apr. 19, 2013), <http://images.nictusa.com/pdf/205/13961856205/13961856205.pdf>. A similarly named committee called “Senate Conservatives Action” is an independent expenditure-only political committee, however, and thus it is possible that

1 Akin was a candidate for the U.S. Senate in 2012, and Akin for Senate was his principal
2 campaign committee. According to the Complaint, after August 19, 2012, several entities
3 previously supporting Akin withdrew their support for his candidacy. Compl. at 2. Beginning
4 on September 14, staff of the Senate Conservatives Fund and Akin for Senate engaged in several
5 conversations that both Respondents have attested were strictly limited to Akin's position on the
6 issue of banning earmarks, a cause that the Senate Conservatives Fund supports. *See* Akin Resp.
7 at 3-4, 7, Ex. 1; Senate Conservatives Fund Resp. at 1-3, Ex. 1. Following that conversation, the
8 Senate Conservatives Fund emailed its members on September 25 and asked them whether it
9 should endorse Akin's candidacy and, if so, how much money they would be willing to donate to
10 Akin's campaign. Senate Conservatives Fund Resp., Exs. 1, 3. Based on the responses it
11 received, the Senate Conservatives Fund endorsed Akin's candidacy on September 27. *Id.*, Ex.
12 1. The Senate Conservatives Fund reported making several independent expenditures in support
13 of Akin in the weeks leading up to the 2012 general election, spending a total of \$118,160.72.
14 Each of the reported expenditures was for either "Online Processing" or "Email List Rental" —
15 that is, for "rental of fundraising donor lists from whom [the Senate Conservatives Fund]
16 solicited, received and forwarded bundled contributions to the Akin campaign and for the costs
17 of online fundraising by [the Senate Conservatives Fund] for bundled contributions to the Akin
18 campaign." *Id.* at 2, Ex. 5.

19 The Complaint cites press reports from September 21-24 asserting that Akin "specifically
20 agreed to [the Senate Conservatives Fund]'s earmark ban in order to receive fundraising support
21 from" the Senate Conservatives Fund. Compl. at 2, Ex. 1-3. Although the Complainant was not

the Complainant confused the two entities. *See* Statement of Organization (July 2, 2012),
<http://images.nictusa.com/pdf/887/12030824887/12030824887.pdf>. According to reports filed with the
Commission, Senate Conservatives Action has not made any independent expenditures in support of Akin.

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1 aware of any communications by the Senate Conservatives Fund at the time, the Complaint
2 asserts that, "should [the Senate Conservatives Fund] sponsor communications in connection
3 with the Missouri Senate election, Akin and [the Senate Conservatives Fund] would violate" the
4 Act. *Id.* at 2.

5 The Senate Conservatives Fund Response claims that "there were no communications or
6 interactions between the Akin campaign and [the Senate Conservatives Fund] that would satisfy
7 the conduct standard . . . nor was there any public political advertising by [the Senate
8 Conservatives Fund] regarding Todd Akin," and thus the Complaint is "purely speculative."
9 Senate Conservatives Fund Resp. at 2 (emphasis omitted). The Akin Response similarly states
10 that (a) discussions between Akin for Senate and the Senate Conservatives Fund were "strictly
11 limited" to Akin's position on the issue of banning earmarks, and "did not include any discussion
12 of the Akin for Senate campaign's plans, projects, activities or needs"; (b) the Senate
13 Conservatives Fund never ran any advertisements supporting Akin; and thus no violation
14 occurred. Akin Resp. at 3 (emphasis omitted).

15 These assertions are buttressed by two affidavits submitted by the Respondents. First,
16 Matt Hoskins, the executive director of the Senate Conservatives Fund, provided an affidavit in
17 which he attests that he had discussions with the Akin staff, but at no time did they discuss the
18 "'needs, activities, plans or projects' of the Akin campaign." Senate Conservatives Fund Resp.,
19 Ex. 1. Second, Justin Johnson, the policy director for Akin for Senate during the relevant time
20 period, submitted an affidavit in which he similarly states that his discussions with the Senate
21 Conservatives Fund's staff "were strictly limited to Representative Akin's position on [banning
22 earmarks] and the rules of the U.S. Senate and House of Representatives governing earmarks,"

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and that at no time did they discuss "the campaign's plans, projects, activities or needs." Akin
Resp., Ex. 1.

B. Analysis

1. The Senate Conservatives Fund Did Not Make a Coordinated Communication

The Act prohibits corporations from making contributions from their general treasury funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b(a). Further, no candidate or political committee may knowingly accept a corporate contribution. *Id.*

Additionally, an expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents" constitutes an in-kind contribution to that candidate. 2 U.S.C. § 441a(a)(7)(B)(i); *see also* 11 C.F.R. §§ 109.20, 109.21(b). These are called "coordinated" expenditures.

11 C.F.R. § 109.20. An expenditure for a communication is coordinated with a candidate or authorized committee when the communication is (1) paid for, in whole or part, by a person other than that candidate or authorized committee; (2) satisfies at least one of the content standards described in 11 C.F.R. § 109.21(c); and (3) satisfies at least one of the conduct standards described in 11 C.F.R. § 109.21(d). 11 C.F.R. § 109.21(a)(1)–(3).

The first requirement was met here. The Senate Conservatives Fund, an entity other than Akin or Akin for Senate, reported making \$118,160.72 in expenditures for "donor list rentals used for fundraising solicitations urging conservatives to contribute to Rep. Akin's campaign . . . and online fundraising processing costs and fees." Senate Conservatives Fund Resp. at 1-2. Even though the communications themselves may have been created at little cost,

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1 the Senate Conservatives Fund incurred significant related expenses. In the most basic sense, it
2 financed a communication.

3 The second requirement, however, is not met. The Senate Conservatives Fund
4 solicitations do not satisfy the content requirement because they are neither electioneering
5 communications nor public communications. 11 C.F.R. § 109.21(c)(1)-(5). An electioneering
6 communication is any broadcast, cable, or satellite communication that (1) refers to a clearly
7 identified candidate for federal office; (2) is publicly distributed within 60 days of the relevant
8 general election or 30 days of the relevant primary election; and (3) is targeted to the relevant
9 electorate. 11 C.F.R. § 100.29(a). The Senate Conservatives Fund's communications were not
10 distributed by broadcast, cable, or satellite, and are therefore not electioneering communications.

11 Nor were they public communications. A "public communication" is defined as

12 a communication by means of any broadcast, cable, or satellite
13 communication, newspaper, magazine, outdoor advertising facility, mass
14 mailing, or telephone bank to the general public, or any other form of
15 general political advertising. The term *general public political advertising*
16 shall not include communications over the Internet, except for
17 communications placed for a fee on another person's Web site.
18

19 11 C.F.R. § 100.26 (emphasis added). The expenditures made by the Senate Conservatives Fund
20 in support of Akin were all devoted to either "Email List Rental" or "Online Processing."
21 Communications over the Internet are specifically exempt from the definition of "public
22 communication" unless placed for a fee on a third party website. 11 C.F.R. § 100.26.

23 The record does not reflect that the Senate Conservatives Fund's fundraising
24 communications were placed for a fee on another website. The Commission has narrowly
25 interpreted the term Internet communication "placed for a fee," and has not construed that phrase
26 to cover payments for services necessary to make an Internet communication. See Factual &

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1 Legal Analysis at 11, MUR 6414 (Carnahan in Congress Committee et al.) (payment for research
2 services used to make website does not result in website being placed for a fee); Factual & Legal
3 Analysis at 8, MUR 6477 (Turn Right USA) (cost to produce advertisement uploaded to
4 YouTube for free does not result in video being placed for a fee).

5 Therefore, the Senate Conservatives Fund's communications were neither electioneering
6 communications nor public communications, and thus do not satisfy the content requirement of
7 11 C.F.R. § 109.21(c).

8 The conduct requirement also does not appear to have been met in this case. The conduct
9 prong is satisfied by numerous types of interaction between a candidate and the person paying
10 for the communication, as described in 11 C.F.R. § 109.21(d). A safe harbor exists, however, for
11 a "candidate's . . . response to an inquiry about that candidate's . . . positions on legislative or
12 policy issues, but not including a discussion of campaign plans, projects, activities, or
13 needs" 11 C.F.R. § 109.21(f). Here, it appears that the Respondents qualify for the safe
14 harbor of section 109.21(f), as they contend.

15 The coordination allegation relies on newspaper articles indicating that Akin agreed to
16 the Senate Conservatives Fund's earmark ban in exchange for assistance with his Senate
17 campaign. Both the Senate Conservatives Fund and Akin, however — the only apparent
18 witnesses to the exchanges between them — state that the communications involved only policy
19 discussions. The Hoskins and Johnson affidavits each deny that any discussion of the plans,
20 projects, activities, or needs of the Akin campaign took place. Senate Conservatives Fund Resp.,
21 Ex. 1 (Hoskins Aff. ¶ 14 (Nov. 12, 2012)); Akin Resp., Ex. 1 (Johnson Aff. ¶ 4 (Nov. 28, 2012)).
22 The conversation between the Senate Conservatives Fund and Akin for Senate about Akin's
23 position on earmarks therefore appears to qualify for the safe harbor provision. 11 C.F.R.

13044343288

§ 109.21(f). Absent some evidence to the contrary — and the record here provides none — the conduct requirement is not met.

Because neither the conduct nor the content requirements were satisfied, there was no coordinated communication under 11 C.F.R. § 109.21, and thus no contribution from the Senate Conservatives Fund to Akin or Akin for Senate. Accordingly, we recommend that the Commission find no reason to believe that the Senate Conservatives Fund, Akin, or Akin for Senate violated 2 U.S.C. §§ 441a or 441b.

2. Akin Did Not Solicit Non-Federal Funds in Violation of Section 441i(e)

The Act prohibits candidates from soliciting funds in connection with a federal election unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act. 2 U.S.C. § 441i(e)(1)(A); 11 C.F.R. § 300.61. The Complaint alleges that “[i]f Akin asked [the Senate Conservatives Fund] to make expenditures in connection with his campaign, Akin would have solicited contributions in excess of the federal limits.” Compl. at 4.

In this context, a violation of section 441i(e)(1)(A) would require both that Akin asked the Senate Conservatives Fund to spend funds in connection with a federal election, and that those funds were not subject to the Act. But, as discussed above, the record does not support either conclusion. First, Akin and the Senate Conservatives Fund appear to have discussed only policy issues pertaining to banning earmarks. *See* Akin Resp. at 3-4, 7, Ex. 1; Senate Conservatives Fund Resp. at 1-3, Ex. 1. And both the Hoskins and Johnson affidavits deny that Akin ever solicited soft money or the payment of advertisements. Senate Conservatives Fund Resp., Ex. 1 (Hoskins Aff. ¶ 36); Akin Resp., Ex. 1 (Johnson Aff. ¶ 5). Second, all funds received and spent by the Senate Conservatives Fund were subject to the limitations, prohibitions, and reporting requirements of the Act, because the Senate Conservatives Fund is a

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registered non-connected political committee. *See, e.g.*, March 2013 Monthly Report (Apr. 19, 2013), <http://images.nictusa.com/pdf/205/13961856205/13961856205.pdf>.

For those reasons, Akin did not solicit funds in violation of section 441i(e). Accordingly, we recommend that the Commission find no reason to believe that Akin or Akin for Senate violated 2 U.S.C. § 441i(e).

III. RECOMMENDATIONS

1. Find no reason to believe that W. Todd Akin, Akin for Senate and G. Scott Engelbrecht in his official capacity as treasurer, or the Senate Conservatives Fund and Lisa Lisker in her official capacity as treasurer violated 2 U.S.C. §§ 441a or 441b.
2. Find no reason to believe that W. Todd Akin or Akin for Senate and G. Scott Engelbrecht in his official capacity as treasurer violated 2 U.S.C. § 441i(e).
3. Approve the attached Factual and Legal Analysis.
4. Approve the appropriate letter.
5. Close the file.

Date

05/16/13


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